Jany 8. 79. Sub N. A. Swayne.

9 otto p. 130
Oct. T. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 686.

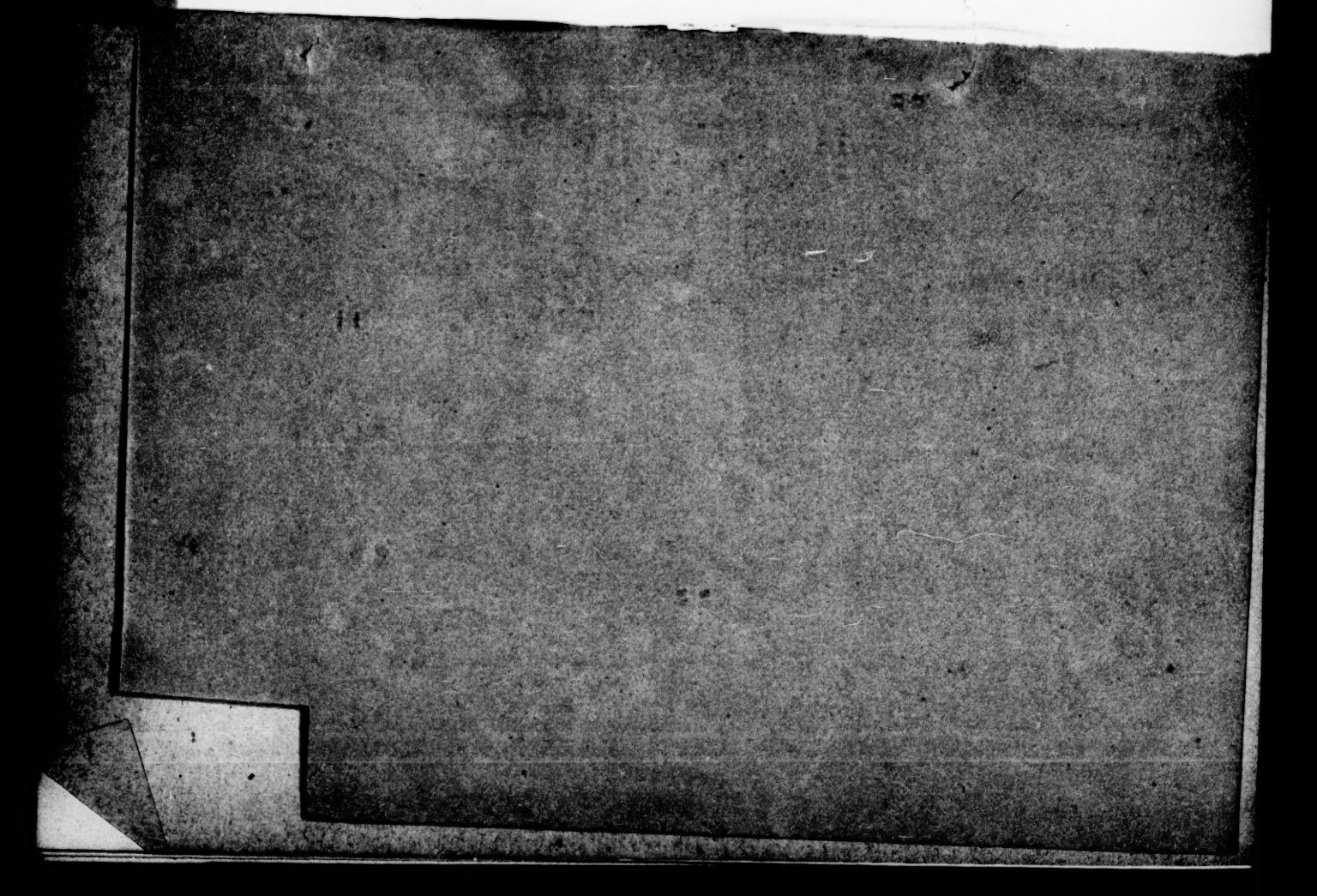
WALLACE WILKENSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED MAY 22, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 686.

WALLACE WILKENSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Indictment	3	1
Plea	6	2
Verdict	7	2
Judgment	8	3
Judgment of Supreme Court	10	3
Writ of error	12	3
Citation	14	4
Assignment of errors	17	5
Opinion	20	5
Certificate of clerk	29	8

1 Be it remembered that on the 12th day of December, A. D. 1877, was filed in the office of the clerk of the supreme court of the Territory of Utah the transcript of the record and proceedings in a certain case theretofore pending in the district court of the first judicial district of said Territory, in which the people of the United States in the Territory of Utah were plaintiffs and Wallace Wilkerson was defendant, which said transcript is in the words and figures following, to wit:

2 In the district court for the first judicial district, Utah Territory.

At the regular term of said court, held in the city of Provo, county of Utah, and Territory of Utah, September 28th, A. D. 1877, among the minutes of said court for that day I find the following entry, to wit:

"The grand jury came into court, and, through their foreman, presented 20 bills of indictment, which were received in open court, and in open court filed in the presence of the grand jury."

I, Cha's W. Emerson, clerk of the district court for the first judicial district of Utah Territory, do hereby certify that, among the said 20 bills of indictment mentioned in foregoing abstract of the minutes of said court, was an indictment against Wallace Wilkerson, charging him with murder in the 1st degree.

In witness whereof I have hereunto set my hand and the seal of said court this 11th day of December, A. D. 1877.

[SEAL.] CHA'S W. EMERSON, *Clerk.*

3 A copy of said indictment is hereunto annexed, and is in words and figures as follows, with the endorsements thereon, viz:

TERRITORY OF UTAH,
First Judicial District, ss:

Of the September term, A. D. 1877, of the district court in and for said district, held in Utah County.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* WALLACE WILKERSON.	Indictment for murder in the first degree.

The grand jurors of the people of the United States in the Territory of Utah, good and lawful men, residents of the first judicial district of said Territory, legally chosen, selected, empaneled, sworn, and charged to enquire in and for the body of said district, in the name and by the authority of the people aforesaid, on their oath do find and present that Wallace Wilkerson, late of the county of Utah, in said district, on the eleventh day of June, in the year of our Lord one thousand eight hundred and seventy-seven, in the county of Utah and Ter-
4 ritory of Utah, within the jurisdiction of this court, with force and arms, in and upon the body of one William Baxter, then and there being, unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly, and with malice aforethought, did make an assault, and that he, the said Wallace Wilkerson, a certain pistol then and there charged with gunpowder and two leaden

bullets, which said pistol he, the said Wallace Wilkerson, in his right hand then and there had and held, then and there unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly, and with malice aforethought, did discharge and shoot off to, against, and upon the said William Baxter; and that the said Wallace Wilkerson, with the two leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Wallace Wilkerson discharged and shot off as aforesaid, then and there unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly, and with malice aforethought, did strike, penetrate, and wound the said William Baxter
5 in and upon the face and right side of the head of him, the said William Baxter, then and there, and thereby giving to him, the said William Baxter, in and upon the face and right side of the head of him, the said William Baxter, two mortal wounds, of which said mortal wounds the said William Baxter then and there instantly died; and the jurors aforesaid, upon their oath aforesaid, do say that the said Wallace Wilkerson him, the said William Baxter, in the manner and by the means aforesaid, unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly, and with malice aforethought, did kill and murder, contrary to the form of the statute of Utah Territory in such case made and provided, and against the peace and dignity of the people aforesaid.

GEORGE W. JACQUES,
Foreman of Grand Jury.

SUMNER HOWARD,
Attorney of the United States for the Territory of Utah.

(Endorsed:) No. The People, etc., vs. Wallace Wilkerson. Indictment for murder in the 1st degree. A true bill. George W. Jaques,
6 foreman. Presented in open court by the foreman of the grand jury, in the presence of said grand jury, and filed by me this 28th day of September, A. D. 1877. C. W. Emerson, clerk. Witnesses, Reuben R. Thomas, George Paxman, W'm Gardner, W'm Laird, D'r H. Doty Pickman. Sumner Howard, attorney of the United States for the district and Territory of Utah.

Thereafter, to wit, on the 29th day of September, 1877, among other things of that date, I find the following entry, viz:

THE PEOPLE, &C., vs. WALLACE WILKERSON. } Indictment for murder in the 1st degree.

The respondent, Wallace Wilkerson, being arraigned at the bar in open court, and upon the indictment being read to him by the district attorney, and he being called upon to plead thereto, pleaded not guilty; whereupon he was remanded to the custody of the sheriff of Utah County.

7 On the 24th day of November, 1877, among other things, I find the following entry, viz:

THE PEOPLE, &C., vs. WALLACE WILKERSON. }

The jury heretofore impaneled in this cause sat together and heard the evidence of J. C. Elmer, the arguments of counsel, the charge of the court, retired from the bar thereof, under charge of an officer duly sworn

for that purpose, to consider of their verdict to be given, and, after being absent for a time, returned into court, and, being called, answered to their names and say: "We, the jury in the above-entitled cause, find the respondent, Wallace Wilkerson, guilty of murder in the first degree."

8 Thereafter, on the 28th day of November, 1877, among other things I find the following entry, viz:

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* WALLACE WILKERSON. } Judgement on verdict.

In this action, on motion of the district attorney, the respondent, Wallace Wilkerson, being arraigned at the bar in open court for sentence, and having been asked by the court whether he had anything to say why sentence should not be pronounced against him, and answering in the negative, therefore it is the judgement and sentence of the court that you be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the 14th day of December next; that between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead. You are remanded to the custody of the U. S.
9 marshal for this Territory, who will see that this judgement and sentence of the court is carried out and executed.

10 SATURDAY, *January 19th*, A. D. 1878.

A session of the supreme court of the Territory of Utah was held this day, beginning at ten o'clock a. m. Present all the justices, the clerk, marshal, and members of the bar.

The court was duly opened, and the record of the last session read and signed.

* * * * * * *

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, respondents, *vs.* WALLACE WILKERSON, APPELLANT. } From 1st dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is ordered and adjudged that the judgement of the district court therein be and the same is hereby affirmed.

11 Afterwards, on the 21st day of January, A. D. 1878, was issued, filed in the office of the clerk of said supreme court of Utah Territory, a writ of error and a citation thereon, of which said writ and citation the originals follow, to wit:

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court for the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendi*s*hon of the judgement of a plea which is in the said supreme court before you

and between the people of the United States in the Territory of Utah and Wallace Wilkenson, a manifest error hath happened, to the great damage of the said Wallace Wilkenson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things conserning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said
13 Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 21st day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

E. T. SPRAGUE,
Clerk of the said Supreme Court of the Territory of Utah.

(Indorsed:) People, &c. vs. Wallace Wilkerson. Filed in office of clerk of supreme court of Utah Territory this 21st day of January, 1878. E. T. Sprague, clerk.

14 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Wallace Wilkenson is plaintiff in error and you the people of the United States in the Territory of Utah are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

MICHAEL SCHAEFFER,
Chief Justice of the Supreme Court for the Territory of Utah.

15 TERRITORY OF UTAH,
Salt Lake County, ss:

On this 21st day of January, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared Enos D. Hoge, before me, the subscriber, clerk of the supreme court of the Territory of Utah, and makes oath that he delivered a true copy of the within citation to S. H. Lewis, assistant United States attorney for the Territory of Utah, and who is now representing the defendant in error in this case as such attorney.

ENOS D. HOGE.

Subscribed and sworn to before me this 21st day of January, 1878.

E. T. SPRAGUE,
Clerk of Sup. Court of Utah Territory.

A true copy of the above citation was received by me this 21st day of January, A. D. 1878.

E. H. LEWIS,
Asst. U. S. Dist. Atty. for Utah.

(Indorsed:) People, &c., vs. Wilkerson. Citation. Filed January 21st, 1878, in my office. E. T. Sprague, clerk sup. court Utah Territory.

16 Afterwards, on the 22d day of January, A. D. 1878, was filed in the office of the clerk of said supreme court of Utah Territory an assignment of errors, of which, and endorsements thereon, the following is a copy, to wit:

17 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, in error to the supreme court of the Territory of Utah.

WALLACE WILKERSON, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, defendants in error.

Now comes the said Wallace Wilkerson, by E. D. Hoge and P. L. Williams, his attorneys, and says there is manifest error in the record, proceedings and judgement of the supreme court of the Territory of Utah, and assign the following as error, to wit:

1st. The supreme court erred in affirming the judgement of the district court wherein and whereby it was adjudged that the said plaintiff in error should be shot to death.

The plaintiff in error therefore prays that said judgment of the supreme court of the Territory of Utah may be reversed, and that a mandate may issue from this honorable court, directing the said supreme court of said Territory to reverse the judgement of the district court and remand the case to the said district court with an order to said district court
18 to discharge the said plaintiff in error.

E. D. HOGE AND P. L. WILLIAMS,
Attys. for Plff. in Error.

(Indorsed:) Wallace Wilkerson, plff. in error, vs. The people of the United States in the Territory of Utah, defendants in error. Assignment of errors. Filed in my office this 22d day of January, A. D. 1878. E. T. Sprague, clerk sup. court, Utah Territory.

19 And afterwards, on the 2d day of February, A. D. 1878, was filed in the office of the said clerk of the supreme court of the Territory of Utah the opinion of said court in *said court in* said cause, of which, and indorsements thereon, the following is a copy, to wit:

20 In the supreme court of Utah Territory, January term, 1878.

THE PEOPLE OF, &C., RESPONDENTS,
vs.
WALLACE WILKERSON, APPELLANT. } Appeal from the 1st district court.

Boreman, justice, delivered the opinion of the court:

The appellant was found guilty of murder in the first degree, and sentenced to suffer death by being shot. From this judgement of the district

court he has appealed to this court, and alleges, as a ground for the reversal of the judgement of the district court, that there is no law in this Territory authorizing the death penalty to be inflicted by shooting, and that the sentence is therefore wrong and void.

The last section (sec. 124) of a former statute of this Territory, entitled "An act in relation to crimes and punishments," approved 6th March, 1852, provided that "when any person shall be convicted of any crime the punishment of which is death, according to the provisions of
21 this act, and sentenced to die, said person shall suffer death by being shot, hanged, or beheaded, as the court may direct; or the person condemned shall have his option as to the manner of his execution."

This section had reference only to the mode of execution, and in effect provided that where any other section prescribed the punishment of death, and a party should be thereunder sentenced to die, that the manner of carrying into execution such punishment should be within the limits specified, namely, shooting, hanging, or beheading, or as the prisoner might select.

The section was evidently restrictive in its nature, allowing that the court had a discretion in the matter as to the mode, but that such discretion *such* be confined to one of the modes specified.

Thus the law stood until 1876, when the legislature enacted a new "crimes and punishment" act (Compiled Laws, p. 564), and therein expressly repealed the old act, thus blotting out the section referred
22 to, respecting the mode of punishment. In the act of 1876, however, it is provided that "every person guilty of murder in the first degree shall suffer death," or, &c. (C. L., p. 586, § 1920.) But no mode, however, of carrying into execution the sentence of death is specified either in that or any other act.

The statute referred to, of 1876, styled the "Penal code," further provides as follows:

'SEC. 10. The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed." (C. L., p. 567, § 1840.)

Thus the penalty of death is denounced against all who are guilty of murder in the first degree, and it is made obligatory upon the courts to impose the sentence of death. Is the court authorized to say how that sentence is to be carried out?

The appellant asserts that the court has no such power, and that, if it had, then the power could only be exercised to fix one manner of punishment—that of hanging—and no discretion was left to the court in the matter.

23 The common law prescribed no one particular manner of inflicting the death penalty, although the mode ordinarily adopted was by hanging the prisoner by the neck until he was dead. Other modes were allowable, and sometimes resorted to, even in murder cases. (4 Bl. Com., p. 376–7.)

The common law did not require the court to fix the mode of execution. It was no part of the judgement, and it was usually not embodied therein. Upon a calender of the capital cases the words "let him be hanged by the neck" were entered by the judge. This calender, after being signed by the judge and clerk, was the only authority which the officer had to execute the sentence of death by hanging. (4 Bl. Com., 403–4; 1 Bishop Cr. Pr., 883.)

Nor do we see that the manner of execution is any more material than

the time thereof, yet neither time nor place were any necessary part of the judgement, and if made parts of it, they were deemed immaterial parts. (1 Bishop, Cr. L., § 730, 3d ed.)

24 If the mode, therefore, be an immaterial part of the judgement, then the entry thereof in the judgement should not be a ground for reversing the judgement.

But, if we assume that the mode is a material part of the judgement and that hanging by the neck was the only mode prescribed at common law, yet there is another provision of our "penal code" which effects materially the case in view of the stress which was laid by both appellant and respondent upon the case of The People vs. Hartung, reported at its various stages in several different New York reports. That statute reads as follows:

"SEC. 5. No act or omission commenced after twelve o'clock noon of the day on which this code takes effect as a law is criminal or punishable except as prescribed or authorized by this code," &c. (C. L., p. 565, § 1835.)

I quote only so much of the section as is material to the point in issue. If murder in the first degree can only be punished as prescribed or authorized in that code, the common law is excluded from our consideration. In New York a similar statute, differently worded, but in

25 effect the same, was enacted. It read as follows: "All punishments prescribed by the common law for any offence specified in this chapter (the chapter included murder), and for the punishment of which provision is herein made, are prohibited."

In that State, as with us, the law designating that the death penalty should be inflicted by hanging had been repealed.

In the case of The People vs. Hartung one of the points was that the law providing for executing the death penalty by hanging had been repealed, and that the section of the New York statute quoted prohibited any common-law mode, therefore no authority existed for the execution by hanging. The case went off on other grounds, yet the court said that although the statute respecting the mode of death had been repealed, and the common law prohibited as a resort in such case, yet the power to enforce the penalty of death existed. The statute of that State provided, as ours does, for the punishment of murder

26 by the death of the murderer, but further provided that a copy of the sentence should be furnished to the governor, and he should issue his warrant for the execution, the execution not to take place until one year after sentence, yet the statute failed to provide in any section for the manner of death.

The court in the case of the People vs. Hartung, after referring to the facts, said: "The mode must, therefore, rest in the discretion of the governor or the sheriff, and for aught I see, the method prevailing in France or Russia or Constantinople, or that which the English law formerly applied to convictions for heresy or petit treason, may be adopted"; and afterwards further said, "When the legislature of 1860 repealed that section of the statute without substituting anything as to the execution of capital sentence in its place, they necessarily determined that it should no longer be obligatory for the court by its judgment, or the executive officers in the performance of their duties, to resort to that method of inflicting the punishment of death." (22 N. Y., 96; 23 How. Pr. R., 323; 26 N. Y., 167; 28 N. Y., 400.)

27 It is likewise in this Territory, as we think, left to the discretion of the court, subjecct, however, to that limit which the constitu-

tion of the United States prescribes against the infliction of "cruel and unusual punishments." (U. S. Const., amendt. VIII.) By no other construction than that of leaving a discretion with the court can any effect whatever be given to the statutes making death the penalty for murder in the first degree and requiring the courts to determine and impose the sentence of death. These sections could not have been intended as nullities; and from the whole penal code we can gather no other idea than that the legislative intent was that the courts should be allowed a discretion in the matter. The question therefore presents itself, "Is the manner designated in the case before us, that of death by shooting, a cruel and unusual punishment?"

We do not think that the appellant so considers it, nor do we think he could. It is the mode adopted for the Army in enforcing discipline. It is a mode recognized and practiced in other civilized countries to
28 enforce criminal laws, and, as we have seen, it was approved by express statute of this Territory for nearly a quarter of a century, and, as history tells us, it is the manner of death of which criminals in this Territory made choice in preference to other modes, such as hanging and beheading. That manner cannot be cruel which criminals prefer, and that cannot be unusual which is often adopted.

If the statute respecting the mode of inflicting the death penalty were still in force no one would say that the infliction thereof by shooting was "cruel and unusual," for the statute expressly designated it; yet the fact that it was once embodied in the statute could not change the character of the manner, for the constitutional provision controls the statute, and the statute could no more provide for a manner of death that was "cruel and unusual" than a court could do so without the statute. The Constitution is binding upon the legislature.

We do not, therefore, perceive that there was anything wrong in the sentence imposed by the district court in this case. The judgment is affirmed.

(Indorsed:) In supreme court Utah, January term, 1878. The People, &c., respondents, vs. Wallace Wilkerson, appellant. Opinion of the court by Boreman, Justice. Filed February 2d, 1878, in my office. E. T. Sprague, clerk of sup. court.

29 In the supreme court of the Territory of Utah.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, respondents,
vs.
WALLACE WILKERSON, APPELLANT.

TERRITORY OF UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory, in obedience to the writ of error hereto attached, return to the Supreme Court of the United States said writ, the citation thereon issued, and the foregoing and attached transcript of the record, proceedings and judgement had in said supreme court of Utah Territory in the above-entitled case, and I hereby certify that said annexed writ of error and citation are the originals thereof issued in said cause, and said transcript, records, and proceedings are full, true, correct, and complete copies of the originals thereof on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court of Utah Territory, at Salt Lake City, in said Territory, this 7th day of February, A. D. 1878.

[SEAL.]

E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

(Indorsement on cover:) No. 686. Wallace Wilkenson, pl'ff in error, vs. The People of the United States in the Territory of Utah. Utah Terry. sup. court. Filed 22 May, 1878.

tion of the United States prescribes against the infliction of "cruel and unusual punishments." (U. S. Const., amendt. VIII.) By no other construction than that of leaving a discretion with the court can any effect whatever be given to the statutes making death the penalty for murder in the first degree and requiring the courts to determine and impose the sentence of death. These sections could not have been intended as nullities; and from the whole penal code we can gather no other idea than that the legislative intent was that the courts should be allowed a discretion in the matter. The question therefore presents itself, "Is the manner designated in the case before us, that of death by shooting, a cruel and unusual punishment?"

We do not think that the appellant so considers it, nor do we think he could. It is the mode adopted for the Army in enforcing discipline. It is a mode recognized and practiced in other civilized countries to
28 enforce criminal laws, and, as we have seen, it was approved by express statute of this Territory for nearly a quarter of a century, and, as history tells us, it is the manner of death of which criminals in this Territory made choice in preference to other modes, such as hanging and beheading. That manner cannot be cruel which criminals prefer, and that cannot be unusual which is often adopted.

If the statute respecting the mode of inflicting the death penalty were still in force no one would say that the infliction thereof by shooting was "cruel and unusual," for the statute expressly designated it; yet the fact that it was once embodied in the statute could not change the character of the manner, for the constitutional provision controls the statute, and the statute could no more provide for a manner of death that was "cruel and unusual" than a court could do so without the statute. The Constitution is binding upon the legislature.

We do not, therefore, perceive that there was anything wrong in the sentence imposed by the district court in this case. The judgment is affirmed.

(Indorsed:) In supreme court Utah, January term, 1878. The People, &c., respondents, vs. Wallace Wilkerson, appellant. Opinion of the court by Boreman, Justice. Filed February 2d, 1878, in my office. E. T. Sprague, clerk of sup. court.

29 In the supreme court of the Territory of Utah.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, respondents,
vs.
WALLACE WILKERSON, APPELLANT.

TERRITORY OF UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory, in obedience to the writ of error hereto attached, return to the Supreme Court of the United States said writ, the citation thereon issued, and the foregoing and attached transcript of the record, proceedings and judgement had in said supreme court of Utah Territory in the above-entitled case, and I hereby certify that said annexed writ of error and citation are the originals thereof issued in said cause, and said transcript, records, and proceedings are full, true, correct, and complete copies of the originals thereof on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court of Utah Territory, at Salt Lake City, in said Territory, this 7th day of February, A. D. 1878.

[SEAL.]

E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

(Indorsement on cover:) No. 686. Wallace Wilkenson, pl'ff in error, vs. The People of the United States in the Territory of Utah. Utah Terry. sup. court. Filed 22 May, 1878.

IN THE SUPREME COURT

OF THE

UNITED STATES.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH,
RESPONDENTS,

vs.

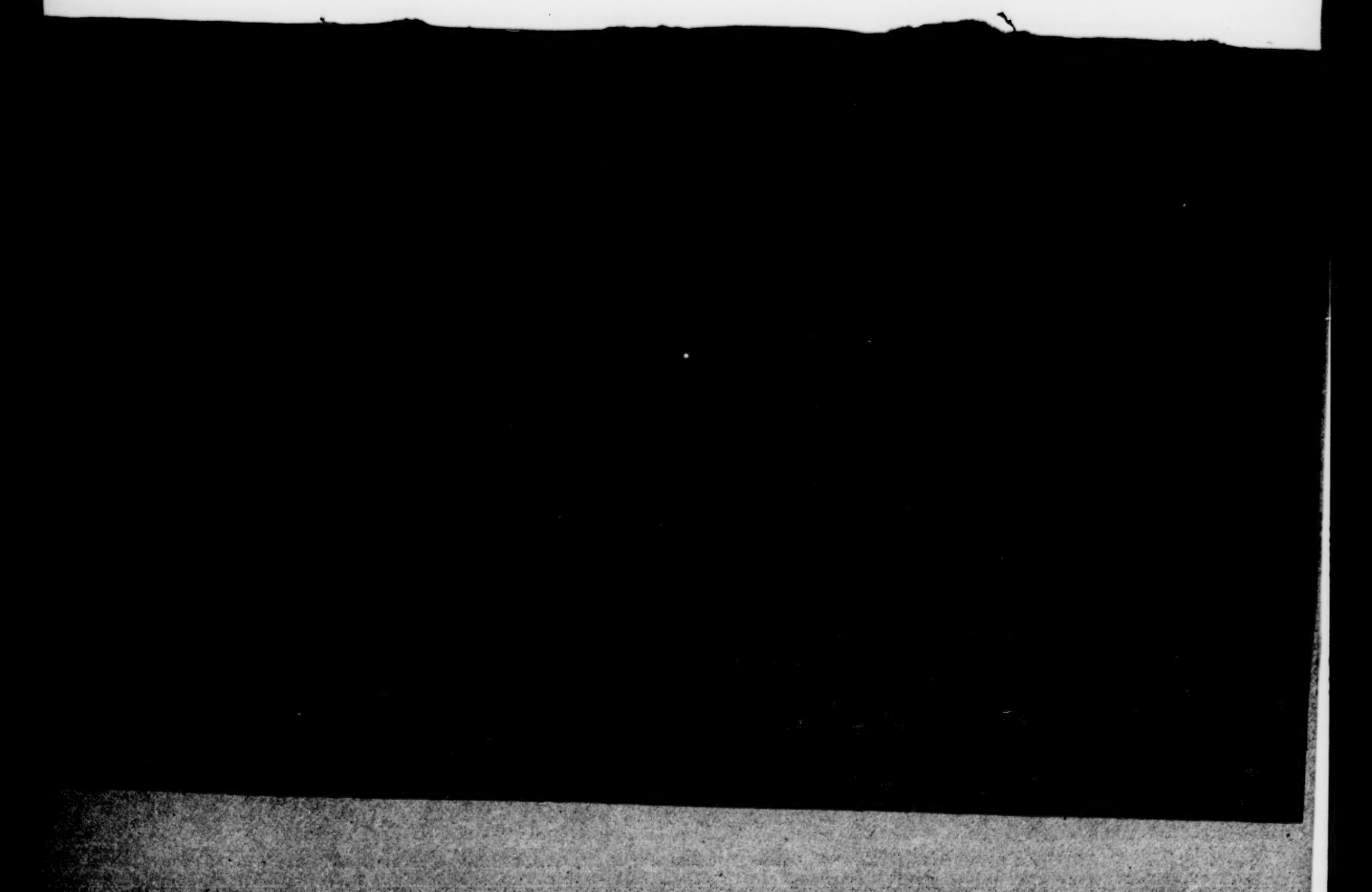
WALLACE WILKINSON,
APPELLANT.

APPEAL FROM THE SUPREME COURT

OF

UTAH TERRITORY.

E. D. HOGE and
P. L. WILLIAMS.
Attorneys for Appellant.



IN THE SUPREME COURT

OF THE

UNITED STATES.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH,
RESPONDENTS,

vs.

WALLACE WILKINSON,
APPELLANT.

APPEAL FROM THE SUPREME COURT

OF

UTAH TERRITORY.

The Appellant was indicted, charged with murder in the first degree; verdict of guilty as charged; upon which verdict the First District Court Court of this Territory, where the case was tried, pronounced the following judgment and sentence:

"Therefore it is the judgment and sentence of this Court, that "you be taken from hence to some place in this Territory, where "you shall be safely kept until Friday, the 14th day of December "next; that between the hours of 10 o'clock in the forenoon, and "3 o'clock in the afternoon, of the last named day, you be taken "from your place of confinement, to some place within this Dis- "trict, and that you there be publicly shot, until you are dead."

We assign error as follows:

The Supreme Court of this Territory erred in affirming the Judgment of the District Court, wherein and whereby it was adjudged that said Plaintiff in error should be "shot to death," and the Court erred in adjudging and sentencing the Appellant to be snot to death.

From the foregoing Judgment and sentence an appeal was taken to the Supreme Court of the Territory, where the same was affirmed as will appear from the opinion of that Court, rendered by Boreman, Justice.

In discussing this case we will first examine the opinion of the Court and try to correct some of the errors into which it has fallen.

The Justice after reciting the law as it stood before the Penal Code of 1876 was passed, as also several sections of the Penal Code, proceeds to say "The Appellant asserts that the Court has "no such power and that, if it had, then the power could only be "exercised to fix one manner of punishment—that of hanging— "and no discretion was left to the Court in the matter."

In this the Justice is most assuredly in error, as the Appellant asserted nothing of the kind, but on the contrary studiously avoided saying anything on that point, it not being in the case. And we claimed that the only point raised in the case was as to the validity or invalidity of the Judgment as it stood, and that it was a nullity because there was no law authorizing such a Judgment in this or any similar case.

If the Supreme Court had reversed the case and sent it back to the District Court for a sentence and judgment as at common law, it would have been time enough then to have raised the question, as we claim and the Court now holds in this case that the common law is not in force in this Territory and cites Section 5,

Penal Code of Utah to sustain the point. That part of this opinion which asserts that hanging is not the mode at common law of executing the death penalty cuts no figure in this case and is of no consequence to us.

Execution is the completion of human punishment and must be strictly performed in the manner which the law directs.

4. Blackstone Comme. 403

4. " " 178 and 179.

Now it will be conceded that if the law had directed a certain mode of executing the death penalty and some other mode had been adopted and the party executed in a different manner from that pointed out by law, it would have been murder in the officer or party so departing from the mode directed by law. The law in this case having failed to direct or point out the manner of executing the death penalty, the Court has no right to legislate and make law, nor supply the defects in the law.

The statute of Utah prior to the passage of the Penal Code in 1876, provided that a person convicted of murder in the first degree, should be executed by being hung, shot or beheaded as the Court might order, or the convicted person choose.

Laws of Utah March 6, 1852, page 61, sec. 124.

This was repealed in terms by the Penal Code.

Compiled Laws Utah, page 651, Sec. 2229.

And no law on the subject of executing the death penalty enacted.

Compiled laws of Utah, page 586, Sec, 1920 provides

"Every person guilty of murder in the first degree shall suffer death.

This is the only law in Utah which refers to murder in this degree. The California Penal Code, and from which ours was taken, uses the exact language of Sec. 1920 of our code.

Cal. Penal Code, page 53, Sec. 190.

The California Penal Code includes also the criminal proceedure all in one act. Our penal code was passed in 1876, and at

the session of the Legislature of Utah in 1878, the criminal proceedure act was passed. This explains why we were left without the law fixing the mode of executing the death penalty.

The Court lays stress upon the 10th section of the Criminal Code and claims that it gives to the Court the right to fix the manner of taking life. The same section, word for word, appears in the California Criminal Code, yet the able codifiers and the legislature of that State thought it necessary to pass section 1228, page 275 Cal. Penal Code, thus showing that neither the codifiers nor the legislature gave to section 10, Cal. Code, section 12, the meaning given to it by the Court in this case, and section 1228 would be entirely superfluous if such a construction could be given to Sec. 12.

The evident intention of that section was to take the fixing of the punishment from the jury, and required the Court to determine and impose the punishment prescribed, and not to manufacture and fix a punishment not prescribed. This construction gives full effect to the section and is the only legitimate construction to be given to it.

We now come to the case referred to by the Justice and from which he quotes largely to-wit, the case of the

People *vs.* Mary Hartung.

We cite this case as it appears in 23 How. Pr. R. 314.

Some case, 22 N. Y. ct. appeals, page 95.

" 26 " " " " 154 and 157.

" 28 " " " " 400.

In this case the party was indicted, tried, convicted and sentenced to be hung under the law as it then stood, and in all this there was no error. Before the time appointed for execution arrived the law under which she was sentenced was repealed and another law still retaining the death penalty passed, but making other provisions necessary before the party could be executed, such as certifying the judgment, &c., to the Governor, who was to issue his warrant at the expiration of one year, &c. The Court of Appeals reversed the case and ordered the party discharged on the ground that although the death penalty still existed, but the

mode and manner of execution of the death penalty that was in force at the time of the conviction and sentence being repealed and a different mode of execution being provided, that she could not be executed at all and must be discharged. She could not be executed under the old law, for that was repealed, nor under the new as that prescribed a different mode of execution from the one in force at the time of conviction and sentence.

Now apply this reasoning to the case at bar and the Appellant here stands exactly in the position that Mary Hartung did, a convicted and sentenced criminal and no power in the courts to enforce the sentence. We submit that the cases are parallel with the reasoning in favor of the Appellant in this case, as there was not at the time of the commission of the offence, nor at the time of conviction or sentence any law authorizing the judgment and sentence in this case.

The Justice quotes from this New York case at length and with approbation, and applies the reasoning of that case just the reverse of what that eminent jurist (Denio) did, as in that case Judge Denio ordered the party discharged, in this the Justice orders the Appellant shot.

E. D. HOGE and
P. L. WILLIAMS,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WALLACE WILKERSON
vs.
THE UNITED STATES. } No. 686.

ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

APPELLEE'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WALLACE WILKERSON
vs.
THE UNITED STATES. } No. 686.

ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

APPELLEE'S BRIEF.

STATEMENT.

Wallace Wilkerson was duly convicted of murder in the first degree by proceedings to which no exceptions were taken. (Record 1, 2, and 3, top.) Having nothing to say why sentence should not be pronounced against him, the judgment and sentence of the district court was that he be publicly shot to death on the 14th of November, 1877. (Record 3, folio 8.) The supreme court of the Territory affirmed this sentence. (Record 3, folio 10.)

An act of the Utah Territory legislature, approved March 6, 1852, § 124, provided that "when any person

shall be convicted of any crime the punishment of which is death, according to the provisions of this act, and sentenced to die, said person shall suffer death by being shot, hanged, or beheaded, as the court may direct; or the person condemned shall have his option as to the manner of his execution."

So the law remained for nearly a quarter of a century. In 1876, a new "crimes and punishment act" was passed expressly repealing the former, but providing that "every person guilty of murder in the first degree shall suffer death," without prescribing the method of its infliction. (Comp. Laws of Utah, p. 586, § 1920.) Nor has any later enactment indicated any particular manner of execution; but the following is another section of the penal code of 1876: "SEC. 10. The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence, to *determine* and *impose* the punishment prescribed." (Comp. Laws, 567, § 1840.)

By the act of June 23, 1874, c. 469, § 3, it is provided that "a writ of error from the Supreme Court of the United States to the supreme court of the Territory [of Utah] shall lie in criminal cases where the accused shall have been sentenced to capital punishment, or convicted of bigamy or polygamy." (18 Stats., 254.)

BRIEF.

The appellant has committed a crime against which the laws of Utah denounce the penalty of death; but it is argued that this denunciation is mere *brutum fulmen*, because the statute does not specifically designate the mode of inflicting the penalty.

There being no common law in that Territory, if the prisoner cannot properly be sentenced to be shot, he cannot to be hung, or to die in any other manner; as the court must evidently have power to select *any* mode of punishment, not "cruel or unusual," or it can select none. (People *v.* Hartung, 23 Howard Prac., 325, cited *infra*.)

The end must include the necessary means. A direction to the court to impose a sentence of death implies the power to make that sentence effective.

The statute of 25 Geo. II, c. 37, § 1, directed that one convicted of murder should be executed according to law on the day next but one after sentence was passed, &c. The third section added, "in which sentence shall be expressed not only the usual judgment of death, but also the *time* appointed thereby for the execution," &c. Yet the court "thought the time did not form a necessary part of the sentence, and that the statute in that respect was merely directory; they were also of opinion that, notwithstanding the statute, the judge might, if he saw fit, order a person convicted of murder to be executed *immediately*, or at any time within forty-eight hours after conviction." (Rex *v.* Wyatt, Russ. & Ry. Cr. Cas., 231, bottom.)

It may be true that if the law directed death by hanging, it would be error to order its infliction by decapita-

tion; but here, where it prescribes the death penalty without indicating the method, yet devolving "a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed," it must be left to that tribunal to declare the manner of executing its own decree. (People *v.* Hartung, 23 How. Prac., 325, cited *infra.*

Blackstone says "the *time* and *place* of execution are by law no part of the judgment." (4 Bla. Com., 404.) Certainly these particulars (especially the *time*) are as essential as the *manner*, it being ordained that the latter shall not be cruel or unusual.

"The time was nothing more than *a direction to the officer* that he should enforce it on a particular day. If he failed in the duty on the day, he might be amenable to the law, but the force of the judgment would still remain." (*Ex p.* Nixon, 2 So. Car. (A. D. 1870), 6.) Is not the *manner* also a direction of the court, indicating *how* as well as *when* its mandate is to be carried into effect? The opinion above cited discusses "the proposition contended on behalf of the petitioner," that the appointed day having elapsed he could not be executed at all, and says: "If we were without authority on the point, the proposition contended for is so much at variance with the conclusions of sound judgment and common sense, on which it is the boast of the law that all its principles are founded, that, unless we are forced by the weight of precedent, we would feel bound to disregard it." (*Ib.*, citing cases to show that the time of execution was unimportant.)

In South Carolina it was also held that a provision contained in an English statute, made of force in that State, that a felon may elect to be transported, should

be enforced as if there were no such provision in it. (State *v.* Bosse, 8 Rich. (Law), 276.)

In People *v.* Hartung (23 How. Prac., 325) are these just observations: "Would it be illegal to declare in such sentence the *time* and the *mode* in which the sentence should be executed, so that it be not cruel or unusual, or violative of any provision of statute or common law? Would not the absence of any legislative provision on the subject amount to an implied authority to the judiciary to regulate the *mode* of administering the punishment in any manner consistent with humanity and law?" * * * "It is of necessity impracticable to embrace all details in a legislative act, and so far as the legislature are silent, I apprehend it would be infered that the *mode* and *machinery* of carrying out the legislative will were purposely left to the judiciary, so long as the main purpose of the act was subserved." (23 How. Pr., 325.) I have preserved the italics of the original.

The judgment against Mrs. Hartung was reversed because, before the sentence was carried into effect, the legislature had repealed all laws relating to the punishment of the crime of which she was convicted. It was not a question of the mode of inflicting a prescribed punishment, but of executing a person, and for an offense as to whom and which there was no law for the infliction of *any* penalty. (Hartung *v.* People, 22 N. Y., 95; 26 N. Y., 167, and 28 N. Y., 400.)

Thus it will be seen that, near the close of their brief, (p. 5) the appellant's counsel misapply the reasoning of the Hartung case to the cause at bar, because the difficulty there was not that there was no *mode* of inflicting

a prescribed punishment, but absolutely *no penalty* for the offense of which she was convicted. Not being punishable, of course Mrs. Hartung had to be discharged, since to detain her was to inflict a punishment where the law had prescribed none.

CHARLES DEVENS,
Attorney-General.

EDWIN B. SMITH,
Assistant Attorney-General.